DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary
Office of the General Counsel
Public Health Division

December 1, 1995

Note to Richard McCloskey

Re: Request for Opinion 94-157: Applicability of the Contract Health Service (CHS) appeal procedures to tribes and tribal organizations administering Title I and Title III agreements

This is in response to IHS' request for legal advice regarding whether the CHS appeal procedures set out in regulations at 42 C.F.R. 36.25 (1986) apply to Title I contractors and Title III compactors under the Indian Self-Determination and Education Assistance Act, Pub. L. 93-638 as amended, 25 U.S.C. 450 et seq. ("Act"). For the reasons discussed below, it is my view that these appeal procedures do not apply in either case unless agreed to by the parties and incorporated into the Title I and Title III agreements.

I note at the outset that a tribe or tribal organization may contract under the Act to make CHS eligibility determinations which would otherwise be made by federal employees. This is specifically authorized by section 105(g) of the Act, 25 U.S.C. 450j(g), which states:

> (g) The contracts authorized under section 102 of this Act and grants pursuant to section 103 of this Act may include provisions for the performance of personal services which would otherwise be performed by Federal employees including, but in no way limited to, functions such as determination of eligibility of applicants for assistance, benefits, or services, and the extent or amount of such assistance, benefits, or services to be provided and the provisions of such assistance, benefits, or services, all in accordance with the terms of the contract or grant and applicable rules and regulations of the appropriate Secretary: Provided, that the Secretary shall not make any contract which would impair his ability to discharge his trust responsibilities to any Indian tribe or individuals.

It is also clear from the above quoted statutory language that tribal contractors must make eligibility determinations in accordance with Departmental regulations and we have repeatedly so advised. In the case of IHS contract health services, this requires

that such determinations be made in accordance with the eligibility criteria set out in 42 C.F.R. 36.21 et seq. (1986).

The question here is whether the phase "in accordance with . . . applicable rules and regulations" in section 105(g) above also brings in the appeals process in section 36.25 of the regulation (attached). In my view it does not.

First, the appeals process in section 36.25 does not by its terms apply to eligibility determinations made by tribal contractors. Rather, the regulation sets out a process for appealing eligibility determinations made by an IHS Service Unit Director, by first requesting a reconsideration by the Service Unit Director, and then appealing the Service Unit Director's decision to the IHS Area Director and finally to the IHS Director. In other words, the regulation is written to provide an appeals process when the IHS is directly operating the contract health services program. Revised eligibility regulations which would have specifically extended the applicability of the appeals process to tribal contractors are currently under a congressional moratorium and may not be implemented.

Second, section 105(g) must be read together with the model agreement in section 108 of the Act and particularly for our purposes here with section 1(b)(13) of the model agreement which states:

> (13) ADMINISTRATIVE PROCEDURES OF CONTRACTOR -- Pursuant to the Indian Civil Rights Act of 1968 (25 U.S.C. 1301 et seq.), the laws, policies, and procedures of the Contractor shall provide for administrative due process (or the equivalent of administrative due process) with respect to programs, services, functions, and activities that are provided by the Contractor pursuant to this Contract.

This provision in the statutory model agreement requires that in exercising contracted functions with respect to IHS programs, for example in making individual eligibility determinations with respect to contract health services, that "the laws, policies, and procedures of the Contractor shall provide for administrative due process (or the equivalent of due process) pursuant to the ICRA. In the ICRA, Congress imposed certain restrictions upon Indian tribes in exercising the powers of self-government similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment to the United States Constitution. In addition to imposing these requirements to strengthen the position of individuals vis-a-vis the tribal government, Congress also intended to promote the well established federal policy of furthering Indian self-government. Santa Clara Pueblo v. Martinez, 98 S. Ct. 1670 (1978). This policy underlies the Indian Self-Determination Act as well and this policy is evident in section 1(b)(13) which provides

individuals with tribal remedies with respect to contracted programs and functions in accordance with the ICRA.

Under rules of statutory construction, when two statutory provisions are capable of co-existence, it our duty to read them together in a manner that gives effect to both. Morton v.Mancari, 94 S. Ct. 2474, 2483 (1974) Toby v. National Labor Relations Board, 40 F. 3d 469, 471 (D.D.C. 1994). In order to give effect to the phrase "in accordance with . . . applicable rules and regulations" in section 105(g), it is not necessary to require that tribal CHS eligibility determinations may be appealed to federal officials under section 36.25 of the regulations. Rather, that phrase may be read simply to require that tribal contractors, in making eligibility determinations, adhere to the eligibility criteria in the regulations as discussed above. This reading gives full effect to section 1(b)(13) of the model agreement as interpreted above and avoids inconsistency with the congressional policy of furthering tribal self-government which is evident in that section.

Finally, I do not believe that the trust doctrine requires that tribal eligibility determinations be subjected to the federal CHS appeal process as a remedy for individuals who want to challenge those determinations. This issue ties into the proviso at the end of section 105(g) which states:

> Provided, That the Secretary shall not make any contract which would impair his ability to discharge his trust responsibilities to any Indian tribe or individuals.

In my view this proviso is inapplicable here. IHS contract health services dollars are not tribal or individual trust resources such as trust accounts, land, timber, or mineral rights administered by the Department of the Interior. Nor does the "special relationship" under which Congress appropriates IHS contract health services funds create Indian property rights where none would otherwise exist. Cherokee Nation of Oklahoma v. United States, 107 S.Ct. 1487, 1491-92 (1987) Quick Bear v. Leupp, 28 S. Ct. 690, 698-700 (1908) Scholder v. United States, 428 F. 2d 1123, 1129 (9th Cir.), cert. denied, 400 U.S. 942 (1970). Consequently, contracting under the Act to operate IHS contract health services programs, including making eligibility decisions, can be distinguished from contracting the exercise of judicially recognized fiduciary (trust) responsibilities with respect to managing Indian trust resources. Seminole Nation v. United States, 62 S. Ct. 1049 (1942) United States v. Mitchell, 103 S. Ct. 2961 (1983). I conclude, therefore, that the proviso in section 105(g) does not impose a limitation on contracting this IHS program.

In summary, it is my view that the appeal procedures in 42 C.F.R. 36.25 (1986) do not apply to tribal administration of IHS contract health services programs under Title I of the Act. I see no reason

for any different conclusion under Title III. I note, however, that under section 303(a)(1) tribal compactors are authorized to administer programs, services, and functions "that are otherwise available to Indian tribes or Indians." In my view the quoted language requires tribal compactors to adhere to eligibility criteria set out in Department regulations at 42 C.F.R. 36.21 et seq.(1986).

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